Supreme Court, U.S.
FILED
MAY 21 1997
CLERK

No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL.,

Appellants,

v.

ROBERT C. BYRD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLEES

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REPLY BRIEF FOR APPELLEES

We showed in our opening brief that (I) appellee Members of Congress have standing to challenge the Line Item Veto Act ("Act") because (a) the Act grants them standing and (b) they have established, by unanswered declarations, that the Act inflicts on them concrete, present, individual injuries, including changing the legal effect of votes they are about to cast; and (II) the Act unconstitutionally enlarges the President's limited role in the legislative process—the power either to approve or to return a bill in its entirety, subject to override. Appellants' arguments do not answer these showings.

I. STANDING

Appellants concede that appellees' challenges to the constitutionality of the Act "are assuredly suitable for judicial resolution." Appellants' Brief at 19 (hereinafter "Br."). They contend, however, that although the Act itself authorizes Members of Congress to seek such a resolution and directs the courts to expedite decision, Members do not have standing now or ever. Appellees do not have standing now, according to appellants, because they are presently asserting only "a generalized interest in the proper application of the Constitution," *id.* at 15, or at most a merely "potential . . . frustrat[ion of their] legislative preferences," *id.* at 16. And appellants say that the appellees can never have standing as Members of Congress because Members do not and cannot have a "judicially cognizable private interest" in the exercise of their constitutional powers. *Id.* at 23. This amounts to an argument that the Act's judicial review provision itself violates Article III of the Constitution. We respond to these contentions in turn.

1. Appellants' argument that appellees have asserted only a "generalized" and "speculative" grievance simply ignores the Act's immediate impact on the legal effect of Members' votes. The district court explained the injury with an abstract example:

> [A Senator's] vote for an "A-B-C" bill might lead to the *post hoc* creation of an "A-B" law, an "A-C" law, or a "B-C" law, depending on the President's use of his newly conferred cancellation authority, for which neither he nor his colleagues would have voted so

> reconfigured. Thus, plaintiffs' votes mean something different from what they meant before . . . .

J.S. at 11a. To illustrate how the example works in practice, suppose items "A," "B," and "C," combined in a single bill, are aid to Egypt, to Jordan, and to Israel.[1] A Member of Congress might well wish to vote for the delicate balance embodied in the entire package but have strong objections to keeping any of these items if others are stricken. But the Act converts a vote for "ABC" *in toto* into a vote for a three-item menu from which the President may select any combination that he alone prefers. The Member is injured at the moment when he must cast his vote to give the President that option, regardless of what the President later does.

This is not a "speculative" injury to appellees. Each Member of Congress will, appellants concede, vote on many multi-item appropriation bills this fiscal year. It is not true that "the gravamen of [appellees'] suit is that the President will, in the future, employ [the cancellation] authority so as to frustrate the proper implementation of appropriations bills enacted by Congress." Br. at 30. Rather, appellees have asserted an injury to the meaning and legal effect of their individual votes, and this interest is expressly rooted in the Constitution. *See, e.g.*, U.S. Const. Art. I, § 3 (each Senator shall have one vote); Art. I, § 5,

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[1] In fact, the Omnibus Appropriations Act, 1997 Pub. L. 104-208, 110 Stat. 3009, § 101(c), appropriates $2,343,000,000 for certain foreign assistance purposes, "Provided, That of the funds appropriated under this heading, not less than $1,200,000,000 shall be available only for Israel, . . . Provided further, that no less than $815,000,000 shall be available only for Egypt . . . ." These two appropriations would be independently vetoable items under the Act. *See* 2 U.S.C. § 691e(7).

cl.3 (requiring recordation of Members' yeas and nays "at the Desire of one-fifth of those Present"). Appellees' claim is that the Act *now* forces appellees, when they vote, to vote for (or against) giving the President a range of choices he is not constitutionally entitled to have. It is indisputable that an ordinary citizen, alleging such a concrete injury to his legal rights, would have Article III standing. Indeed, the government does not contest that appellees have been "injured in fact," that these injuries are directly traceable to the operation of the Act, and that a declaration that the Act is unconstitutional will redress their injuries.

Appellants also make a "prudential" ripeness argument that "the Act's *practical* consequences . . . cannot be determined until the President has exercised his cancellation authority." Br. at 31. This argument is irrelevant because the Act's judicial review provision sweeps away such prudential considerations, but it is also wrong. As the district court recognized, (J.S. at 14a-15a), waiting for the President to find an unneeded museum to veto will not sharpen the constitutional issues and will only prolong the constitutional "cloud" hanging over the Act and future legislation subject to it that prompted Congress to include the judicial review provision in the first place. *See Buckley v. Valeo*, 424 U.S. 1, 113-18 (1976) (ruling on the constitutionality of the Federal Election Commission, even though it had not yet issued any decisions that adversely affected the challengers, because of an expedited judicial review provision); *see also Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

Although appellants contend that an actual veto is "too speculative" to satisfy Article III (Br. at 30), the President has promised to use his item veto authority promptly

(Appellees' Brief at 30 n.16 (hereinafter "Opening Br.")), and he will certainly be presented with bills containing vetoable items no later than September 30, 1997. Moreover, the individual appellees do not, by themselves, have the power to exclude spending bills from the Act, and there is no reason to think that both Houses will suddenly decide to deny the president the use of the Act after having just passed it. Finally, the inclusion of the expedited judicial review provision constitutes an implicit rejection by Congress of the notion that an item veto is too speculative to justify judicial review of the Act's constitutionality at this time.

2. Appellants argue that appellees nevertheless lack standing to complain of injury to their constitutional voting powers because they "exercise their official powers on behalf of the people" and hence they can suffer no injury in their official capacities "that is not shared by the public generally." Br. at 15. Indeed, appellants go further and argue that neither a Member nor his constituents (because their interest is too diffuse) have standing to complain of a concrete injury to the Member's voting rights. *Id.* at 23-24. Under appellants' view, Members of Congress simply have no "judicially cognizable" personal interest in their votes or the other constitutional prerogatives of their office.

On its face, appellants' sharply circumscribed view of standing is extraordinary. It means that if Representative Adam Clayton Powell had been paid his salary but denied the right to cast his vote, or the right to take his seat on the floor of the House of Representatives, he would not have

had standing to sue.[2] *But cf. Powell v. McCormack*, 395 U.S. 486, 493, 550 (1969) (defendants included House Doorkeeper, "who threatened to deny Powell admission to the House Chamber"). It means that if William Marbury had received his salary, he would not have had standing to sue for the right to hold and exercise the powers of his office. *But cf. Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 173 (1803) ("The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing.") It means that if a law provided that first-term Members were not allowed to vote on appropriations bills, or that *every* Member was disqualified on grounds of partiality from voting on major federal projects in his or her own district, no Member would be a proper Article III plaintiff.

Appellants cite no case holding that Members of Congress lack standing in such situations. Their only citation is to then-Judge Scalia's concurring opinion (but on this point, a dissent) in *Moore v. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984).[3] They attempt to

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[2] It is, of course, not necessary that a plaintiff suffer an economic injury to have standing to sue. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616 (1989) ("Our precedents demonstrate that a party may establish standing by raising claims of noneconomic injury.").

[3] *Moore*, in which the D.C. Circuit upheld Member standing, actually presented a more difficult standing issue than that presented here. In *Moore*, Members of the House of Representatives complained that a tax law had unconstitutionally originated in the Senate. 733 F.2d at 948. No statute authorized Members to sue, and the constitutional text at issue did not purport to grant rights to individual Members, as the Constitution does with respect to members' votes. *Cf. supra* at 3-4. Upholding standing in this case does not require the Court to go as far as the D.C. Circuit did in *Moore*: the Court need only decide that Members

(continued...)

bolster their position by arguing that (a) "citizens are the ultimate beneficiaries of [the Presentment Clause] provisions" (Br. at 23, quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)); (b) citizens would not have standing merely because they are ultimate beneficiaries (*id.* at 23-24); and therefore, (c) Members (who in their official capacities are the *direct* beneficiaries of the Clause) do not have standing either. *Id.* But this argument is a *non sequitur*. There are many cases where persons who suffer the immediate impact of a legal wrong are the logical and constitutionally proper plaintiffs even though the "ultimate beneficiaries" of the right in question cannot sue. For example, trustees sue where their beneficiaries would historically have been barred from the law courts and today are barred by the terms of a trust indenture.

In the specific context of legislative voting, the Court has held that legislators "have a plain, direct and adequate interest in maintaining the effectiveness of their votes" sufficient to enable them to proceed in a federal court. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). Appellants labor to distinguish *Coleman* on the ground that the legislator plaintiffs in *Coleman* brought suit in state court and were in this Court only on a petition for certiorari to

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[3] (...continued)
of Congress have standing to sue where (a) they allege an injury involving interference with their lawmaking responsibilities, (b) Congress has explicitly authorized them to sue as part of the statute that forms the basis of their claim, and (c) the claim itself is plainly justiciable. Upholding standing in these circumstances does not involve courts "setting [themselves] up as arbiters of . . . internal dispute[s]" among the political branches, or deciding questions that should be left to those branches. *Moore*, 733 F.2d at 958 (opinion of Scalia, J.).

review a state court judgment. *See* Br. at 28-29 n.15. But *Coleman*'s holding cannot be limited to cases concerning the Court's appellate jurisdiction. The *Coleman* plaintiffs had *lost* in the state courts and were renewing their federal claims in this Court. They were the parties "attempting to invoke the federal judicial power" and "seek[ing] entry to the federal courts for the first time in the lawsuit." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 618 (1989). As the Court explained in *ASARCO*, the Court has jurisdiction to review a state court decision only where, in addition to a federal question, there is a case or controversy *and* the parties who bring the case to federal court—the legislators in *Coleman*—claim a "distinct and palpable" injury sufficient to give them "standing to invoke the authority of a federal court." *Id* (citation omitted). If the *Coleman* plaintiffs had lacked Article III standing to proceed in a federal district court, this Court would have lacked jurisdiction to review the state court's decision at their behest.

Appellees' other attempts to distinguish *Coleman* are equally unavailing. The interest of a Member of Congress in his vote is no less "concrete and palpable" than that of a state legislator. *Cf. Wesberry v. Sanders*, 376 U.S. 1 (1964) (federal voters, like state voters, have standing to protect their votes against dilution through malapportionment). Appellants also note that federal separation of powers principles "are not binding upon the states." Br. at 29 n.15. But the important point is that in this case the statutory judicial review provision, the concreteness of the injury, and the conceded fitness of the question for judicial resolution remove any separation of powers concern.

Finally, this Court's own reading of *Coleman* is that the Court there recognized that legislators have an interest in their own votes sufficient to give them Article III standing. In *Baker v. Carr*, for example, the Court cited *Coleman* for the proposition that individuals have standing because they have an interest "in maintaining the effectiveness of their votes . . . [and] not merely a claim of the right possessed by every citizen to require that the government be administered according to law." 369 U.S. 186, 208 (1962) (citations and quotation marks omitted). *See also Buckley v. Valeo*, 424 U.S. 1, 12 n.10 (1976).[4]

II. THE MERITS

1. Appellants acknowledge that "a hypothetical statute conferring true item veto (*i.e.*, partial "return") authority," (Br. at 36), would violate Article I's requirement that "the President . . . sign or return, *in toto*, a bill presented to him by Congress . . . ." Br. at 34. The sole purpose of the Act, as its title frankly proclaims, is to evade this constitutional constraint, and appellants admit that there is no significant difference between the "practical effect" of the Act's sign-and-then-cancel procedure and a "true item veto." Br. at

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[4] Appellants' explication of the law governing suits on behalf of the government or on behalf of Congress as an institution (Br. at 25-29) is irrelevant. Appellees are not invoking the jurisdiction of the federal courts as representatives of the United States or of the Congress as a whole. They seek to vindicate a right that the Constitution gives them individually in their capacity as Members. *See INS v. Chadha*, 462 U.S. 919, 935-36 (1983) ("We must also reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress, rather than simply Chadha's private interests.").

36. The parties to this case thus agree that the Act was deliberately designed by Congress to accomplish two objectives: to comply with the procedural formalities of Article I, and to defeat the very purpose of those formalities. Because the Constitution condemns "indirect attempt[s] to accomplish what the Constitution prohibits [Congress] from accomplishing directly," *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1867 (1995), the Act violates the fundamental constitutional requirement that the President either approve a bill or return it in its entirety.

2. Although appellants recognize that "[t]he legislative steps outlined in Art. I are not empty formalities," (Br. at 36), quoting *Chadha*, 462 U.S. at 958 n. 22, they nonetheless argue that the requirements of the Presentment Clause are strictly procedural and are satisfied the moment an appropriations act is signed, regardless of what is "canceled" the following moment. But even if appellants are correct—that is, even if "the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded," *U.S. Term Limits*, 115 S. Ct. at 1868—the Act is still unconstitutional, for it grants to the President the power to make law (or, more precisely, to *unmake* law) in violation of the "single, finely wrought and exhaustively considered, procedure" mandated by Article I. *Chadha*, 462 U.S. at 951. As demonstrated at length in our opening brief, once an item is canceled under the Act, it is extinguished. It is no longer law, and neither the President who canceled the provision nor any successor President can exercise the authority that the provision, before its cancellation, had granted. It can be restored to the status of law only if it is reenacted according to the procedure prescribed by Article I. Thus, the power to "cancel" a duly

enacted spending or tax code provision is the power to *repeal* the provision, plain and simple. And "repeal of statutes, no less than enactment, must conform with Art. I." *Id.* at 954.

Appellants, however, argue that the Act merely grants discretion to the President to determine "whether items of spending that Congress has authorized will in fact be spent." Br. at 37. The Act should therefore be tested, appellants say, according to the rules applicable to the President's execution of the laws under Article II, rather than the finely wrought procedures for lawmaking under Article I.

The cancellation power granted under the Act, however, is not a "discretionary" or "executive" power at all. The President is not given any power to fill in interstices of spending or tax measures, or to reduce or reallocate spending based on experience, assessments of program costs, familiarity with aspects of implementation of a program, or changes in circumstances over time. Appellants argue that the Act merely sets a new "default rule," meaning that it makes all spending discretionary unless expressly designated as mandatory. This argument fails because the Act does not grant the President any form of executive discretion under Article II to tailor spending during the life of an authorization, but grants him only the Article I legislative power to strike authorizations (and entitlements and certain tax benefits) at the time of enactment. Indeed, the Act empowers the President to cancel items only if he has signed a bill into law, but not if the law has been enacted over his veto or without his signature. *See* 2 U.S.C. §§ 691(a), 691e(1), 691f(c). If Congress had intended to confer cost-cutting discretion in

"executing" spending legislation, it would not matter how such a bill became law.

In short, the power that Congress intended to, and did, give the President in the Act is not Article II discretion in executing the provisions of spending legislation, but rather is Article I power to extinguish provisions in such legislation. The Act is therefore at war with the basic and undisputed principle that Congress may not convey its Article I lawmaking power to the President or expand his Article I veto power unless and until the Constitution is so amended.[5]

3. None of appellants' examples of grants of spending (or other) discretion resembles the Act's transfer of legislative power to the Executive.

a. Appellants rely heavily on the fact that Congresses, including the First Congress, have enacted many statutes appropriating "sums not exceeding" specified amounts, allowing the President to spend less than the ceiling, and sometimes to allocate the allowed amount as the President sees fit among authorized activities. All such statutes differ fundamentally from the Act.

First, a "sums not exceeding" statute grants the President or an agency head a true discretion in the execution of the spending measure under Article II. He can determine, over the appropriation period, what sums are needed for the purpose specified in the statute. Under some

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[5] *See, e.g., Loving v. United States*, 116 S. Ct. 1737, 1744 (1996) ("[T]he lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

of the statutes cited by appellants, he may decline to spend amounts "that may not be needed for the purposes for which appropriated." Act of March 4, 1933, ch. 281, § 4, 47 Stat. 1602 (Br. at 5). Other cited "sums not exceeding" measures permit the President to "provide for contingencies, or . . . effect savings wherever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-enactment] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-66 (1950) (Br. at 5). Similar statutes permit the President or an agency to "adapt to changing circumstances." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (Br. at 3). The spending discretion granted under such statutes can be exercised by the President at any time during the appropriation period, and an exercise of the granted discretion does not disturb, let alone extinguish, the underlying appropriation law. On the contrary, the law remains in effect, authorizing the further exercise of presidential discretion in executing its provisions. Indeed, the President (or his successor) retains discretion throughout the appropriation period to reverse a prior decision in light of new information, further experience, or reordered priorities.

The Act, in contrast, grants no proper Article II discretion. It authorizes the President only to strike the appropriation (or entitlement or tax provision) itself, permanently, at its birth. And if the President (or his successor) later decides as Chief Executive that "contingencies," or "changes in requirements," or new "developments" warrant spending a previously canceled item, he is powerless to revive it, because his cancellation extinguished the appropriation law itself.

Second, while there has been some variation in the kinds of authority granted, appropriation statutes phrased in "ceiling" terms nevertheless reflect the expectation that the President *will* take care that the programs and activities provided for by law are faithfully carried out. *E.g.*, *Lincoln*, 508 U.S. at 192 (lump-sum appropriation to agency gives it discretion to "meet its statutory responsibilities in what it sees as the most effective or desirable way" by distributing its funds "among some or all of the permissible objects"). The Act, by contrast, is a transfer of power not merely to reduce expenditures, nor to meet statutory responsibilities in the most effective way, but to "surgically terminate" (H.R. Conf. Rep. No. 104-491 at 20 (1996)), at the time the President signs the bill, the programs and activities that those appropriation items would fund (and entitlements and tax benefits to which private citizens are statutorily entitled).

Appellants cite §§ 202(a) and 203(a) of the Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, 82 Stat. 271-72 as comparable authority to the Line Item Veto Act. Br. at 6. Those sections, apparently enacted prior to the passage of the fiscal 1969 appropriations acts, did set spending ceilings, subject to specified exceptions, and the President would have had to make reductions to meet those ceilings if the estimates set forth in his budget were enacted. But appellants cite no authority to show that the appropriations acts that Congress did pass in fiscal 1969 exceeded those ceilings, or that anyone considered whether allowing the President to act in that manner was constitutional. In any event, if the threshold for such reductions was reached, the President was *required* to make them, whereas under the Line Item Veto Act he is free to

cancel whatever amounts he chooses—or to cancel nothing at all. Furthermore, there was neither a time limit tied to the bill's enactment for making reductions, nor was the President prevented from changing his reductions after his initial decision. And, contrary to appellants' assertion (*id.*), the appropriations acts for fiscal years 1970 and 1971 did not contain any mandatory reductions, but simply allowed the President to increase the ceilings, up to fixed amounts, if certain limited categories of expenditures or receipts exceeded the targeted levels.

b. Almost all of the remaining examples cited by appellants involve delegations of interstitial power under Article II. In some cases, it is the power, in Chief Justice Marshall's phrase, to "fill up the details." *See Wayman v. Southard*, 23 U.S. (10 Wheat) 1 (1825); Opening Br. at 46-47. In some of these cases, the executive discretion granted has been broad, but the executive or agency discretion has always been constrained by the policies of the substantive statute and subject to judicial review for conformity therewith. *See* Opening Br. at 47. In a few cases, almost always involving foreign affairs, the power has been phrased as a power to turn a statutory provision on or off, but in each case the trigger for doing so has been the occurrence of a statutorily specified event which the President determines to have happened. *See id.* at 47-49. As the district court noted, such statutes are examples of Congress "'legislating in contingency'; that is, where Congress itself determines in advance when conditions yet to occur should cause the law to cease to be operative. The President is merely the instrument of its will." J.S. at 27a. None of these statutes resembles the Act's grant of power, over eight years, to make irrevocable determinations at the

times of enactment of a wide range of statutes, that some of their provisions should not be part of operative federal law.

The statute in *Field v. Clark*, 143 U.S. 649, 692 (1892), for example, instructed the President to impose certain tariffs on specified conditions. In sustaining the statute, the Court noted that once the President found that the specified conditions had been met, "it became his duty" to impose the tariffs. *Id.* The President was the "mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *Id.* at 693. The Court, as we have previously noted, explicitly recognized that Congress cannot "invest the President with the power of legislation." *Id.* at 692.

Appellants also cite *Touby v. United States*, 500 U.S. 160 (1991), holding that Congress may delegate authority to the Attorney General to add substances to statutory schedules under the Controlled Substances Act, 21 U.S.C. § 811(h), on an emergency basis. But there was a statutory standard for such additions ("imminent hazard to public safety"), and the Court upheld the statute only after finding that the defendant had the right to judicial review, *see* 500 U.S. at 168, the clearest possible indication that Congress had granted only interstitial Article II discretion bounded by statutory requirements. Again, that power to respond to changing circumstances over time is nothing like the President's essentially unbounded, and certainly unreviewable, one-time and irreversible Article I power under the Line Item Veto Act to strike provisions of future appropriation, entitlement, and tax laws at the time he signs them.

Appellants cite the Rules Enabling Act, 28 U.S.C. § 2072 ("REA"), which empowers this Court to prescribe

rules of procedure for the lower federal courts and provides that such rules supersede prior conflicting laws. Br. at 49. There Congress decided to assure that all former rules of practice, procedure, and evidence for the federal courts be replaced by the new uniform system that this Court would promulgate. But the REA has no bearing on the question whether the Act unconstitutionally expands the President's powers under Article I or merely delegates executive authority under Article II. The REA concerns the very different relationship between Congress and this Court in writing rules for lower federal courts established under Article III, and in any event, the constitutional questions presented by the REA have never been adjudicated.

4. Acceptance of appellants' delegation argument has enormous implications, as the district court recognized. J.S. 26a. The power claimed here cannot be confined to legislation relating to the amount of federal spending or revenues, but rather could include the power to eliminate substantive provisions, such as entitlement authorizations, as well. In fact, as noted above, the Act allows the President to cancel the funding of whatever discretionary or new programs he chooses, with decidedly substantive effects on the beneficiaries of such programs. If, as Appellants urge, the Constitution permits Congress to delegate to the President the Article II power to cancel appropriations and tax preferences, it would permit similar delegations in every other substantive area. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). There would thus be no constitutional basis to preclude Congress from giving the President the power to cancel substantive conditions and restrictions—"fencing language"—imposed in spending or tax bills. Indeed, under appellants' theory of delegation,

there is no reason the President could not be given similar power over substantive areas of law that have little or no spending implications, such as civil rights, regulation of health and the environment, or the federal criminal code.

Similarly, there is no reason the cancellation power must be limited to *new* direct spending and tax laws. Appellants do not contend that the Act's five-day window in which the President must cancel items is a constitutional rather than a merely statutory limitation. Thus, if it is constitutional to grant the President the power to cancel an entitlement-creating provision that was signed five days earlier, there would be no constitutional impediment to his canceling similar provisions enacted at any previous time, by any previous Congress.

5. There is a final reason the Act is not a delegation of discretion in the execution of spending and tax measures. "Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review . . . ." *Chadha*, 462 U.S. at 953 n.16. The Act makes no serious pretense of providing any such "check," precisely because it does not purport to confer any sort of executive discretion under Article II, but rather gives the President a new role in the lawmaking process under Article I. Thus, the absence of standards further demonstrates that the Act is an attempt to restructure the Article I lawmaking process and not a delegation of executive power at all.[6]

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[6] Indeed, if the Act were tested under the nondelegation doctrine, it would surely fail because of this absence of standards. We respectfully suggest that if this Act can survive scrutiny under this Court's nondelegation doctrine, there is nothing left of the doctrine at all.

The Act requires the President to make three determinations, but none of them does any more than ask the President to make the same determination that he makes in vetoing any measure, without either congressional guidance or any possibility of review. He is simply doing, on a line by line basis, what Hamilton (The Federalist No. 73) said the President would do with the more limited power to veto a whole bill: "preventing [what he thinks are] bad laws." *See* H.R. Conf. Rep. No. 104-491 at 15 (1996).

Similarly, the requirements that he cancel an item within five days after signing a bill, and cancel only whole items, simply reflect the intention to give him an item veto in the legislative process; they do not give him "significant guidance" (Br. at 44) on how much to cancel or in which programs. The requirement that he "consider the legislative history, construction, and purposes of the law" appears to relate only to the identification of what is an "item," and in any event is not a meaningful constraint. The requirement that he articulate the reasons for his decision only mirrors the constitutional requirement that when the President "returns" a bill he shall do so "with his Objections." U.S. Const., Art. I, sec. 7, cl. 2. Although appellants suggest (Br. at 45) that this requirement "provides an additional safeguard against arbitrary action," they do not suggest that the President's item veto choices can be judicially reviewed, nor do they explain in what sense the President's choices could *be* improperly "arbitrary." The whole idea is to allow him to make whatever spending or tax choices he wishes at the very time he signs a bill into law. That is a power Congress cannot give him under the Constitution as it now stands.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, this Court should affirm the decision of the district court.

Respectfully submitted,

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May 21, 1997